secretary had collected from the members of the association. He was asked to prepare the accounts of such money but he failed to do so up to the date of the outbreak of the fire. I think it is part of the prosecution case that the appellant intended to destroy all account books by burning them. The treasurer said that the appellant had not accounted for money he collected amounting to about $1,378, but in answer to cross-examination by the appellant the treasurer admitted that the accounts had not yet been audited.

According to two young persons, one a boy of 12 and another of 16 years, they saw something burning on the ground floor of the premises, and they also saw the appellant outside the door of that part of the floor used as the office of the association. The 12 year old boy Chan Soon Kong said that the appellant also helped to put out the fire and after some water had been poured on the burning part the boy noticed, to use his own words, "fire on the flowing water." Whereupon he said something to the effect that there must be petrol in the flowing water. When he made this remark, the appellant warned the witness not to mention petrol in case witness' uncle — apparently the caretaker — would get into trouble. The older boy corroborated this part of the story but according to him what the appellant said was this "Do not mention about petrol. Your uncle has a car. If you mention it your uncle would be salah."

There was evidence by the caretaker of the premises to the effect that when he saw the appellant some time later in the day at another place, the appellant was said to have remarked that the fire was caused in the first floor by a fault in the electric wiring. The electrical engineer said that in his opinion the fire could not have been caused by an electrical fault. The fire officer said that there was fire on the ground floor as well as on the first floor and in his opinion because of the good condition of the first floor the two fires originated separately. In other words, it was not a case of the fire starting on one floor and spreading to the other.

At the trial the appellant elected to say nothing. Nor did he call any other witness on his behalf.

It will be seen that it was the prosecution case that the appellant caused the fire on both floors and his intention was to destroy all papers and accounts of the association and his motive was to get rid of all evidence that might be used against him for failure to account for the money he was alleged to have collected from members of the association.

At the hearing of the appeal Mr. Ajaib Singh quite rightly said that the evidence against the appellant was only circumstantial evidence. It was therefore for the trial court to consider whether these bits of evidence are true and having regard to all of them whether they force him to come to one conclusion and one conclusion only that the appellant was guilty.

The learned judge himself after summarising the facts of the case said as follows:

> "In all the circumstances of this case the evidence in my judgment reasonably suggests that it was the accused who was responsible for the fire."

Though at a later stage the learned trial judge, after referring to the evidence of the boy about petrol, which evidence in his opinion, clearly showed the guilty conduct of the appellant said:

> "At the close of the prosecution case I was more than satisfied that a case had been made out against the accused which, if unrebutted, would warrant a conviction."

In our view, the learned judge had been unduly influenced by the appellant's alleged motive for destroying all papers connected with the accounts of the association and also on the evidence of the two young persons in reference to appellant's attempt to restrain the two lads from referring to the fact that there was petrol in the flowing water.

As Murray-Ainsley C.J. in *Kartar Singh & Anor.* v. *Rex* [1] says:

> "Where there is direct evidence, however, slight, the jury are entitled to accept it and the case should be left to them to decide. In the case of circumstantial evidence the position is different. Here the evidence must be such that, if it is believed, there is no reasonable alternative to the guilt of the accused. If it is anything less than this it is no case at all."

In our view, there was insufficient evidence upon which the learned judge could have come to the conclusion beyond reasonable doubt that it was the appellant who started the fire to destroy the building. We would therefore allow the appeal and set aside the conviction and sentence.

Appeal allowed.

MOHAMED ABDUL KADER v. PUBLIC PROSECUTOR

[A.C.J. (Ong Hock Sim J.) September 1, 1966]

[Penang — Criminal Appeal No. 7 of 1966]

Penal Code, ss. 349, 350 and 353 — Using criminal force to a public servant to prevent him from discharging his duty — Ingredients of.

The accused had been convicted of using criminal force to a public servant to prevent him from discharging his duty. The evidence was that the appellant who had a chopper in his hand had said "If you go in I will hammer you".

Held: as no force was in fact used the appellant could not be convicted of using criminal force and further as it was only an inference that the public servant would be prevented from entering the shop, there was no evidence that the appellant intended to prevent the

public servant from discharging his duty; therefore the conviction must be set aside.

MAGISTRATE'S CRIMINAL APPEAL.

S. Natha Singh for the appellant.

Haji Suhaimi bin Dato' Kamaruddin (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim J. (delivering oral judgment): This appeal is not one which rests solely on a question of fact. Section 349 defines what is force and criminal force is defined in section 350. The illustrations thereto show that some application of force to the other party is required to amount to using criminal force. Assault however requires no contact with the body and section 351 says any gesture or preparation which causes the other person to apprehend that he who makes that gesture or preparation is about to use criminal force is assault.

In this particular case, there is the so-called movement of the appellant's hand which was at that time holding a chopper followed by the words "if you go in, I will hammer you." Whatever that may be, certainly it did not constitute use of criminal force. It could perhaps come under section 503 of the Penal Code:

> "Whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."

That gesture followed by the words could amount to criminal intimidation.

To substantiate the charge it must be shown that criminal force has been used. I would read the very passage which the learned deputy public prosecutor has read:

> "The criminal force used by accused on Tan (P.W.1) was used when accused raised his meat chopper, contemporaneously with the threatening words, i.e. at the juncture Tan (P.W.1) told accused he wanted to go into rear portion of the premises."

Again the charge here is that the accused used criminal force to a public servant to prevent him from discharging his duty. It was in evidence and it was agreed that at that time P.W.1 had not shown his letter of authority. It is therefore a mere presumption that his uniform is sufficient identification of himself as a public servant. Then he goes on to say:

> . . . . even if after Tan (P.W.1) had formally identified himself, had shown the letter of authority (P.2) to accused, accused further used criminal force on Tan (P.W.1) by going on to say that even the Chief Minister Mr. Wong Pow Nee could not enter the back portion of the shop."

He held that after this formal identification of the identity by Tan (P.W.1) accused should have allowed and not prevented Tan (P.W.1) in law a public servant from the execution of his duty as such public servant.

Now this is what P.W.1 said:

> "I showed accused my letter of authority and told him I am authorised to enter the back portion of the shop. He said even the Chief Minister, Mr. Wong Pow Nee cannot enter into the back portion of the shop. Since he said earlier he would assault me, I did not enter the back portion of the shop."

This is what P.W.3 says:

> "P.W.1 showed to accused one letter of authority. Accused said Dato' Wong Pow Nee's order, no one can enter inside."

If that is a fact then this seems to me to be more in line with the defence. But having come to accept the evidence of P.W.1 in toto, the learned magistrate held that after his formal identification accused should have allowed and not prevented a public servant from the execution of his duty as such public servant. I find no evidence that Tan was prevented. It was an inference of Tan from the words, that he would be prevented from doing so, and he did not try to enter the rear of the shop.

I find having regard to the fact that the accused had been fairly co-operative with P.W.1 to the extent of producing his National Registration Identity Card to P.W.1 that he was not likely to resist any exercise of authority of P.W.1 if he was minded to do so. That is substantiated by the particulars of the appellant's National Registration Identity Card which are entered in the police report.

In the circumstances I allow the appeal and quash the conviction and order that the fine be refunded to the accused if it had been paid.

Appeal allowed.

Solicitors: *Natha Singh & Subbiah.*

MOONEY & ORS. v. PEAT, MARWICK, MITCHELL & CO. & ANOR.

[O.C.J. (Raja Azlan Shah J.) September 1, 1966]

[K.L. — Civil Suit No. 324 of 1965]

Practice and Procedure — Pleadings — Application to strike out statement of claim — Claim by shareholders against accountants and secretaries of company — Whether shareholders entitled to bring action — R.S.C., 1957, O. 25 r. 4.

This was an application to set aside a statement of claim as disclosing no reasonable cause of action. The plaintiffs were shareholders of a company and they brought the action against the accountants and secretaries of the company alleging breach of their duties. It was argued that the action could only have been brought by the company.

Held: (1) the rule in *Foss* v. *Harbottle* [5] was not applicable as that rule was only referrable to domestic activities and internal managements of companies;

(2) in this case it was alleged that there was a breach of the duty of care arising from contract, it could not be said that the claim disclosed no reasonable cause